THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not reportable

Case No: 1238/2016

In the matter between:

MERCHANT COMMERCIAL FINANCE (PTY) LTD **APPELLANT**

and

KATANA FOODS CC **RESPONDENT**

Neutral citation: *Merchant Commercial Finance (Pty) Ltd v Katana Foods CC* (1238/2016) [2017] ZASCA 191(20 December 2017)

Coram: Leach, Tshiqi and Swain JJA and Makgoka and Ploos van Amstel AJJA

Heard: 22 November 2017

Delivered: 20 December 2017

Summary: Fraudulent scheme causing a factoring business to make payments by factoring fictitious sales – respondent's director falsely verifying in a series of transactions that goods had been sold and delivered to respondent – in last three transactions such verification not made before payments made – prior conduct having lulled appellant into making such payments – causation proved in regard to loss suffered by reason of last payments.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Moshidi and Matojane JJ and Hawyes AJ, sitting as a court of appeal):

1 The appeal succeeds, with costs.

2 The order of the court a quo is set aside and is replaced by the following:

'(a) The appeal succeeds with costs.

(b) The order of absolution granted by the trial court is set aside and is substituted with the following:

(i) The defendant is to pay the plaintiff the amount of R404 557,26 together with interest thereon *a tempore morae* to date of payment;

(ii) The defendant is further to pay the plaintiff's costs of suit.'

JUDGMENT

Leach JA (Tshiqi and Swain JJA and Makgoka and Ploos van Amstel AJJA concurring)

[1] The appellant, a private company which described itself, probably somewhat inaccurately, as carrying on a factoring business, was the victim of a fraudulent scheme concocted between one of its clients and a person in the employ of the respondent, Katana Foods CC (Katana). As a result of this scheme, which in modern dictum would be described as a 'scam', the appellant paid various amounts which it was unable to recover. When the truth was out, it sued the respondent for its loss. Its claim related to but three of a number of

invoices it had 'factored' as described more fully below, it having been paid in full in respect of the remaining factored invoices, albeit not by the person who was obliged to do so.

[2] When the matter came to trial in the Gauteng Division, Johannesburg the trial court (Satchwell J) concluded that although the payments had been made, the appellant had failed to establish that this was due to fraud on the part of the respondent, and granted an order absolving the respondent from the instance. An appeal to a Full Court (Matojane J, Moshidi J and Hawyes AJ) was similarly unsuccessful. This further appeal is with special leave granted by this Court.

[3] Factors are agents whose ordinary course of business is to sell or to dispose of goods to which they have been entrusted with the possession and control by their principals. The distinctive characteristic of this form of agency is that it is customary for the factor to have the authority to sell and alienate, or pledge in its own name, the goods to which it has been entrusted, or to give credit to the purchaser.[1] The appellant, however, carried on business in a somewhat different way. Essentially its scheme of business was as follows. It entered into written agreements with clients, referred to as the 'supplier' in terms of which it purchased and took cession of the claims the supplier had against its customers in respect of goods sold and delivered to them. The customer thereafter had to pay those debts to the appellant, and the appellant would pay the supplier the amount of its invoice value, less a factoring charge and any amount of interest that may have become due on its account. The appellant's standard factoring agreement included a provision[2] that the appellant would maintain a current account in its books relating to all

[1] A J Kerr 'Estoppel and the Rei Vindicatio: Brokers, Factors and Agents for Sale' (1977) 94 *SALJ* 260 at 265; E Kahn *Contract and Mercantile Law* Vol II p 869 note *(b).*
[2] Clause 4.7.

transactions relating to the supplier, and would pay interest at an agreed rate on the amount by which the current account was in credit from time to time but would charge interest should the current account be in debit.

[4] On 15 May 2006, the appellant entered into a factoring agreement with Black Ginger 81 (Pty) Ltd (Black Ginger) a private company which traded under the name BKN Sales & Distribution. In terms of this agreement, the appellant purchased and took cession of claims that Black Ginger had against its customers at the commencement date of the factoring agreement or which came into existence during the subsistence of the agreement, relating to sales made by Black Ginger to its customers on credit in the ordinary course of its business.

[5] Katana, a customer of Black Ginger, then applied in writing to open an account with Black Ginger in order to purchase goods on credit. This form included details such as Katana's VAT registration number, contact details, physical trading address and details of its directors, one of whom was a Mr David Rahman. This application was made available to the appellant to enable it to perform its own credit check on Katana. It did so and agreed to factor invoices for goods to be sold by Black Ginger to Katana on credit, up to a value of R750 000.

[6] Consequently, on 17 July 2006, the appellant notified Katana that pursuant to its application it had entered into a factoring agreement with Black Ginger, and that the debts reflected in invoices rendered by Black Ginger to Katana were ceded to the appellant to whom payments were to be made. The letter reads as follows:

'SUPPLIER: Black Ginger 81 (Pty) Ltd T/A BKN Sales

We wish to inform you that in order to effect certain economies and to assist the future development and growth of their company, the above supplier has availed themselves of the factoring services rendered by [the appellant] . . .

In order to facilitate procedures, we advise as follows:

1. ORDERS

All enquiries and orders should be addressed to your supplier as before.

2. INVOICES AND STATEMENTS

Although invoicing will continue to be done by the supplier, invoices will record that the debt has been ceded to [the appellant] who will be responsible for issuing monthly statements and to whom payments must in future be made.

3. PAYMENT

The debt reflected in the statements which will be rendered to you will be owing to [the appellant] to whom payments must be made on due date. Only payment to [the appellant]. . . will constitute a valid discharge of your present and future indebtedness . . ..'

[7] Pursuant to these events and the factoring agreement, in June 2006 the appellant factored the first invoice raised by Black Ginger in respect of goods ostensibly sold and delivered to Katana on credit. On 19 June 2006, Mr Rahman, who as I have mentioned was a director of Katana but was also its buying officer, confirmed to a verification clerk employed by the appellant that the goods reflected on the invoice had indeed been purchased and received by Katana and that the latter would pay the appellant the amount owing on the invoice. This verification followed the standard verification process adopted by the appellant. The information provided was captured on Katana's debtor's account by the verification clerk and confirmed in the letter faxed to Katana Food.

[8] This was the first of a series of transactions involving the appellant factoring sales purportedly made by Black Ginger to Katana. On a further ten occasions thereafter until 18 April 2007, Mr Rahman confirmed to the appellant's verification clerks that goods reflected on Black Ginger invoices had been sold on credit to Katana for factoring by the appellant and delivered to Katana. In each and every instance after Mr Rahman had confirmed that the goods had been sold and received, the appellant send verification letters to Katana.

[9] All appeared to be going swimmingly, especially as the appellant was paid in full in respect of all the invoices that it had factored in this way up to the last three invoices numbered 105156, 105551 and 105332. These, too, Mr Rahman confirmed related to goods Katana had bought on credit from Black Ginger and were to be factored by the appellant as usual. This confirmation was given by him in respect of the first of these invoices on 3 May 2007 and the last two on 31 May 2007. However, in June 2007 a cheque deposited in the appellant's bank account as payment on an outstanding amount with reference to Katana's debtor's account with the appellant, was returned unpaid by the bank. It was then discovered that the cheque in question had been drawn on Black Ginger's account and not paid by Katana as it should have been. This led to the appellants first suspending and then terminating Black Ginger's factoring facility.

[10] After attempting unsuccessfully to recover payment of the last three invoices from it, the appellant resorted to launching an application to wind-up Katana. In opposing this application, Katana let the cat out of the bag. From its answering affidavit deposed to by Mr C Vassarotti, its managing member, it appeared that in each and every one of the instances where the appellant had

factored invoices in respect of sales made by Black Ginger to Katana, all such sales were fictitious and had never taken place; and that Mr Rahman had falsely confirmed that Katana had purchased and received the goods in question.

[11] Mr Vassarotti explained that the manager of Black Ginger, Mr Preggy Nurasiaha, had entered into what he termed an 'arrangement' with Mr Rahman to the effect that Black Ginger would raise fictitious invoices reflecting goods ostensibly sold and delivered to Katana, but would later issue Katana with credit notes to the value of the invoices. Mr Vassarotti stated that he had become aware of this scheme in August 2006 and had immediately instructed Mr Rahman to cease this activity. However, unbeknown to him, Mr Rahman had not done so but had continued with his so-called 'arrangement' with Mr Nurasiaha until May 2007 when the last invoices (ie those which are the subject of the present dispute) were factored.

[12] It was on the strength of these fraudulent invoices that the appellant had made payments to Black Ginger believing that such amounts were due under the factoring agreement. In pursuance of this fraud, a total of 13 fictitious invoices were factored by the appellant and payments exceeding R3 million were made to Black Ginger. In all instances the repayments purportedly made to the appellant in respect of the amounts factored were in fact made not by Katana but by Black Ginger. In this way, save for the last three invoices which remain unpaid, the appellant was paid all the amounts that it was entitled to receive had the invoices been valid.

[13] The total loss suffered by the appellant flowing from the last three invoices, including factoring charges and interest, amounts to R404 557,26.

It was not disputed in this court that such amount had in fact been lost by the appellant pursuant to the scam of which it had been a victim. And although it was initially pleaded by Katana that Mr Rahman had not acted within the course and scope of his employment with Katana at the time of his so-called 'arrangement' with Mr Nurasiaha of Black Ginger, it was ultimately accepted that he had. The respondent, however, contended that both of the courts below had been correct in finding that the appellant had not shown that fraud on the part of Mr Rahman had caused it to factor the three unpaid invoices.

[14] In order to consider the respondent's argument in this regard, it is necessary to describe the circumstances under which the appellant came to factor and make payments in respect of those invoices. Katana was but one of Black Ginger's clients in respect of which the appellant had agreed to provide factoring services. On 2 May 2007, the appellant received a schedule of invoices having a total value of R888 652,37 offered to it by Black Ginger for factoring. This contained a number of invoices from various clients. One of these was invoice 105156 dated 12 April 2007. It related to goods to the value of R261 459 purportedly sold and delivered by Black Ginger to Katana. Immediately before this schedule was received, an amount of R15 781,04 was then available to Black Ginger in its current account with the appellant. However, on the strength of the schedule, and after a calculation done in longhand on Black Ginger's account, a payment of R650 000 was made to Black Ginger, the appellant's Managing Director, Mr Philippou, having authorised such payment by affixing his signature on the appellant's daily payout schedule. This payment included the amount that the appellant calculated was due to be paid to Black Ginger in respect of invoice 105156. It was only on the following day, after such payment had been effected, that a verification clerk of the appellant contacted Mr Rahman and obtained his

verification (which was of course false) that the goods reflected in invoice 105156 had in fact been purchased and received by Katana.

[15] Whilst the respondent argued, quite correctly, that payment in respect of invoice 105156 was therefore made before Mr Rahman fraudulently stated that the goods to which it referred had been sold and delivered to Katana, its further contention that the payment was before the invoice had even been received by the appellant seems not to be correct. Analysis of the documentation shows that the invoice had in fact been received and 'captured' – the expression used at the trial – in the appellant's bookkeeping process on 2 May ie the day before the R650 000 payment was made. That payment was thus made on the strength of a number of Black Ginger's invoices to various clients delivered to the appellant, including invoice 105156 issued to Katana.

[16] I turn to invoices 105331 and 105332, both of which are dated 24 May 2007. The former, relating to 7 200 gift sets at a total purchase price of R131 328 and the latter relating to 12 000 packets of Elastoplast Clear Strips having a purchase price of R150 753,60 were amongst a batch of invoices taken into account to advance an amount of R186 000 to Black Ginger. This was done on the strength of an undertaking given by Black Ginger to supply the appellant with invoices totalling R267 304,94. When, on 30 May 2007, the invoices duly arrived at the appellant, supported by a schedule marked 100, they totalled a slightly higher amount than had initially been indicated (R293 083,09). In any event, the invoices so delivered included invoices 105331 and 105332. The payment of R186 000 made on 25 May 2007 was authorised by Mr Craig Naim, one of the appellant's directors. Then on 30 May 2007, a further payment of R165 000 was made to Black Ginger. In doing so, the appellant paid out all available funds against invoices that were factored by Black Ginger with the

appellant, including invoices 105331 and 105332. It was, however, only on 31 May 2007, that a verification clerk of the appellant contacted Mr Rahman who verified, once again falsely, that the goods reflected on invoices 105331 and 105332 had indeed been purchased and received by Katana.

[17] As appears from the above, invoice 105156 to the value of R261 459 was factored and included in the payment of R650 000 made to Black Ginger on 2 May 2007. Invoices 105331 and 105332, to the value of R131 328 and R150 753,60, respectively, were factored in favour of the appellant as part of the payments of the amounts of R186 000 and R165 000 paid on 25 May and 30 May 2007. And importantly, all these invoices were factored and payments made to Black Ginger in their regard before Mr Rahman had been contacted by the verification clerks of the appellant to confirm that goods had been purchased and delivered. Moreover, neither Mr Philippou nor Mr Naim were called to explain in evidence why they had authorised the payments before verification had taken place.

[18] These facts led to the appellant's claim failing, both in the trial court and in the court a quo. In her judgment in the trial court, Satchwell J stated that Mr Rahman had 'made no misrepresentations prior to payment' of the three unpaid invoices, and only did so after payment had been made. She went on to state that the payments that were made had not been induced by any 'specific misrepresentation' made by Mr Rahman 'on these particular dates'. Her approach was approved by the court a quo, which went on further to state:

'It would I think not be correct for the court to infer without more that previous instances of misrepresentations in the ordinary course of business induced [the appellant] to accept that the last three invoices were genuine invoices issued in the normal course of business as

payment was a result of an exercise of a discretion by the manager or a director who elected not to give evidence.'

[19] I turn to consider whether these conclusions are sustainable. There can of course be no liability if it is not proved, on a balance of probabilities, that the conduct of Katana, or more correctly Mr Rahman, caused the appellant's loss. Essentially the issue is one of causation, namely, can the fraudulent statements made by Mr Rahman in respect of the previous invoices be said to have caused the loss suffered in respect of the last three unpaid invoices? In this regard it is well established that in order to succeed the appellant had to establish both factual and legal causation as set out in cases such as *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) at 700F-G and *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) para 12. If there is a lack of factual causation, that is the end of the matter. But if there is, it becomes necessary to consider legal causation, namely whether the act complained of is sufficiently closely linked to the loss suffered for legal liability to be imposed.[3]

[20] The test frequently employed in determining the issue of factual causation is the so-called 'but-for' test, explained in *International Shipping* by Corbett CJ as follows:[4]

'In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such a hypothesis plaintiff's loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the plaintiff's loss; [otherwise] it would not so have ensued.'[5]

[3] Cf *mCubed International (Pty) Ltd & another v Singer & others NNO* 2009 (4) SA 471 (SCA) para 22.
[4] At 700F-G.
[5] *International Shipping* at 700H.

[21] In applying the 'but-for' test, it is important to apply common sense to the facts.[6] In addition, it is not a question of deciding upon formulaic quantifications and percentages. As this Court said in *Van Duivenboden*:[7]

'A plaintiff is not required to establish the causal link with certainty, but only to establish that the wrongful conduct was probably a cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what can be expected to occur in the ordinary course of human affairs rather than an exercise in metaphysics.'

[22] Turning to the question of legal causation (or remoteness of damage as it is sometimes called), the issue is one to be determined by considerations of policy. It serves as a measure of control to ensure that liability is not extended too far. It recognises that liability should not be imposed where, despite the other elements of delictual liability being present, right-minded persons, including judicial officers, will regard it as untenable to do so.[8] In determining whether damage is too remote, tests involving foreseeability, proximity, direct consequences, all of which are relevant, 'should not be applied dogmatically, but in a flexible manner so as to avoid a result which is so unfair or unjust that it is regarded as untenable.'[9]

[23] The conclusion of the courts below that the appellant had failed to establish factual causation as the fraudulent misrepresentations made by Mr Rahman in respect of previous instances were irrelevant to the enquiry in regard to three invoices at the heart of this appeal, has to be considered in the

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[6] See eg *Kakamas Bestuursraad v Louw* 1960 (2) SA 202 (A) at 220B-C, *Siman & Co (Pty) Ltd v Barclays National Bank Ltd* 1984 (2) SA 888 (A) at 917H-918A and *Minister of Finance & others v Gore NO* 2007 (1) SA 111 (SCA) para 33.
[7] Para 25.
[8] See eg *Fourway Haulage SA (Pty) Ltd v SA National Road Agency Ltd* 2009 (2) SA 150 (SCA) para 31 and *mCubed International v Singer* 2009 (4) SA 471 (SCA) para 27.
[9] Per Brand JA in *Fourway Haulage* para 34.

light of these principles. I find myself unable to agree with those courts process of reasoning. Had the three unpaid invoices stood alone and been the sole false transactions which Black Ginger had perpetrated upon the appellant with the assistance of Mr Rahman, it may have been different. But in my view, it is artificial to approach the matter by quarantining those invoices from what had gone on before and viewing them in isolation. They formed the last of a series of fraudulent activities designed to induce the appellant to make payments to Black Ginger which it would otherwise not have made.

[24] This course of on-going conduct succeeded. Not only did Mr Rahman's actions cause the appellant to factor the previous invoices on behalf of Black Ginger but it made him a party to Black Ginger establishing a course of business which clearly lulled the appellant into accepting the bona fides of invoices it submitted for factoring. That is the most obvious and probable conclusion to be drawn from the facts, as we know that as soon as the appellant had a whiff that all was not well with Black Ginger's account, it immediately shut it down.

[25] In these circumstances, it seems to me to matter not that neither Mr Philippou nor Mr Naim testified to explain why they were prepared to authorise the payments that were made in May 2007. The inferences are obvious and by reason of the history of Black Ginger's account (which ultimately all turned out to have been nothing but fraud in which the respondent's Mr Rahman played a substantial part) they had no reason to suspect that they were about to become the victims of a scam in that the invoices were irregular and fictitious.

[26] Similarly, it does not lie in the respondent's mouth to attempt to distance itself from whatever representations may have been made by Black Ginger in respect of these three invoices. As confirmed by Mr Rahman's subsequent conduct in verifying the correctness of the invoices, they, too, fell within the ambit of the scheme. Put somewhat differently, the false representations Mr Rahman had made previously in regard to all the invoices Black Ginger had factored by reason of his misrepresentations as to the truth, led to the three unpaid invoices being similarly factored.

[27] Furthermore, had Mr Rahman not previously made the previous series of false representations in regard to the goods reflected in the earlier invoices, the entire fraudulent scheme would have collapsed. Consequently if at any stage prior to the three unpaid invoices having been issued, he had come clean and not made the false representations which he did, they would not have been factored and the loss claimed by the appellant would not have been suffered. The 'but-for' test was clearly satisfied in respect of factual causation and the courts below erred in concluding otherwise.

[28] In these circumstances the fact that Mr Rahman had only verified the three unpaid invoices after they had been factored and paid does not mean that the appellant's claim had to fail. His previous fraudulent misrepresentations were in themselves sufficient to cause of the harm suffered by the appellant in factoring the last invoices, which were responsible for the loss.

[29] So, too, did the court a quo err in its specific finding that should it have erred in respect of factual causation, legal causation had not been established. I find its judgment on this issue to be somewhat confusing. It stressed that the

enquiry as to factual causation was distinct from that as to legal causation or remoteness. But then it accepted that if factual causation was proven, the loss that was suffered was too remote as factual causation had not been shown! This conflated the two distinct enquiries as to factual and legal causation. Accordingly, it failed to give any cogent reason for holding that legal causation had not been established should there have been factual causation. Essentially it held no more than that factual causation had not been proved, and for the reasons already given, in that it erred.

[30] In any event, the damage which the appellant presently claims was clearly foreseeable throughout the ongoing fraudulent scheme to which Mr Rahman was a party. In fact that scheme seems to have been clearly designed to induce the appellant into believing that all invoices delivered to it by Black Ginger were genuine. It is, in my view, untenable to suggest that in these circumstances the damage which was ultimately suffered was too remote from the earlier utterances made by Mr Rahman in fraudulently deceiving the appellant into making the payments that it did. It was a direct and readily foreseeable consequence of his fraud. The fact that Black Ginger's representatives participated in the scheme, and were themselves guilty of fraud, does not exculpate Mr Rahman.

[31] Accordingly, in my view, there can be no question but that the appellant established both factual and legal causation on the part of the actions of Mr Rahman which led to the loss that is the subject of the appellant's claim. Both the trial court and the court a quo erred in reaching the contrary conclusion. They ought to have held the respondent liable to the appellant in respective of its loss of R404 557,26 suffered in respect of the three unpaid

invoices the appellant had factored in May 2007. The appeal must therefore succeed and there is no reason for costs not to follow the event.

[32] The following order will issue:

1 The appeal succeeds, with costs.

2 The order of the court a quo is set aside and is replaced by the following:

‘(a) The appeal succeeds with costs.

(b) The order of absolution granted by the trial court is set aside and is substituted with the following:

(i) The defendant is to pay the plaintiff the amount of R404 557,26 together with interest thereon *a tempore morae* to date of payment;

(ii) The defendant is further to pay the plaintiff’s costs of suit.’

_____

L E Leach

Judge of Appeal

Appearances:

For the Appellant:	F Van Zyl SC
	Instructed by:
	Werksmans Attorneys, Cape Town
	Lovius-Block, Bloemfontein
For the Respondent:	H A Van der Merwe
	Instructed by:
	Jeff Donenberg and Co, Parktown North
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